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# In the Supreme Court of the United States

**OCTOBER TERM, 1941.**

## No. 614.

IN THE MATTER OF
VAN SWERINGEN CORPORATION, Debtor,
and
THE CLEVELAND TERMINALS BUILDING COMPANY,
Subsidiary Debtor.

THE TERMINAL AND SHAKER HEIGHTS
REALTY COMPANY
(formerly Midamerica Corporation),
*Petitioner,*

vs.

THE CLEVELAND TERMINALS BUILDING COMPANY,
*Respondent.*
(A. B. GOCHENOUR, *et al., Intervenors.*)

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SIXTH CIRCUIT.

## BRIEF OF RESPONDENT IN OPPOSITION TO THE PETITION.

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THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO

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## BRIEF OF RESPONDENT IN OPPOSITION TO THE PETITION.

The Terminal and Shaker Heights Realty Company (formerly named "Midamerica Corporation" and hereinafter referred to as "Midamerica") has filed herein its petition and supporting brief, praying that a writ of certiorari be issued to review an order of the Circuit Court of Appeals for the Sixth Circuit entered in this cause on

April 16, 1941. Said order affirmed an order of the District Court for the Northern District of Ohio, Eastern Division, allowing for $2.00 only a claim by Midamerica against The Cleveland Terminals Building Company (hereinafter called the "Debtor") on the Debtor's Second Mortgage Bonds in the principal amount of $1,200,000. Midamerica's petition for a rehearing was denied by said Circuit Court of Appeals on June 25, 1941 (R. 323).

## QUESTION PRESENTED.

The question presented is whether Midamerica should be allowed to prove for $1,348,614.99 (full principal and interest) a claim on Second Mortgage Bonds of the Debtor in the principal amount of $1,200,000., which Midamerica purchased for $2.00, or whether Midamerica's recovery on said claim should be limited to the amount it paid for said Bonds, plus interest thereon, in view of the fact Midamerica was an instrumentality used by the controlling directors of the Debtor and their associates to purchase said Bonds for themselves at a small fraction of their face amount while the Debtor was insolvent.

## STATEMENT.

The Debtor is an Ohio corporation. On October 31, 1930, and at all times thereafter down to September 30, 1935, O. P. and M. J. Van Sweringen and C. L. Bradley were three of the five directors of the Debtor, and C. L. Bradley was the President and M. J. Van Sweringen was the Vice President of the Debtor (R. 45-46; Exhibit K, offered at R. 31). During all of said period, all of the capital stock of the Debtor was owned by Van Sweringen Corporation, a majority of the voting stock of Van Sweringen Corporation was owned by Vaness Company (hereinafter called "Vaness"), and 90% of the voting stock of Vaness was owned by the Van Sweringens and Bradley (R. 30-31).

On October 31, 1930, the Debtor borrowed from J. P. Morgan & Company (hereinafter called "Morgan") $23,500,000. and on the same date Vaness borrowed from Morgan $16,000,000. (R. 31). The Van Sweringens personally guaranteed payment of said two loans aggregating $39,500,000. (R. 121-122), but never paid anything on their guaranties. Prior to September 30, 1935 (the date of the auction sale hereinafter mentioned), $930,000. of the Bonds on which Petitioner's claim is based were owned by the Debtor and pledged with Morgan as security for said $23,500,000. loan of the Debtor, and the remaining $270,000. of said Bonds were the property of Vaness and pledged with Morgan as security for said $16,000,000. loan to Vaness (R. 34).

The notes evidencing said two loans to the Debtor and Vaness matured on May 1, 1935. On or about that date, a letter was delivered to Morgan, signed on behalf of The Cleveland Terminals Building Company by Bradley, President, and John P. Murphy, Secretary, on behalf of Vaness by O. P. Van Sweringen, President, and John P. Murphy, Assistant Secretary, and signed personally by O. P. Van Sweringen and M. J. Van Sweringen, representing and admitting that said parties and each of them were unable to pay said notes in whole or in part other than by resort to the sale of the collateral securities pledged to secure the same, and waiving notice of protest or non-payment of said notes, and also waiving notice of any sale of the collateral held for said notes because of the default in the payment of the principal and interest upon said notes (R. 126-127; Exhibit A, offered at R. 122).

Between May 1, 1935 and August 1935 the Van Sweringens made numerous efforts to raise capital with which to rescue the securities representing control of the so-called "Van Sweringen Empire" which were pledged with Morgan, on a basis which would preserve to them control of the said Empire and a major share of the profits which

might accrue from increased value and earning capacity of said securities and the enterprises which they represented (R. 197-8, 216-220). In August they worked out an arrangement for such financing with George A. Ball of Muncie, Indiana and G. A. Tomlinson of Cleveland, Ohio (R. 34-35), which was finally set forth in a letter from Ball and Tomlinson to the Van Sweringens dated September 21, 1935 (R. 60; Exhibit S, offered at R. 35). This letter agreement, though signed by Ball and Tomlinson, was drawn by the Van Sweringens' attorneys (R. 35). The letter agreement (Exhibit S, R. 60) provided for the organization of Midamerica, the purchase of 20,000 shares of its first preferred stock for $2,000,000. and 15,000 shares of its common stock for $15,000. by Ball and Tomlinson, a Board of six Directors of whom the Van Sweringens and Bradley would be three, a ten year option to the Van Sweringens to purchase 55% of the common stock from Ball and Tomlinson at their cost of $8,250. plus 5% interest per annum, and for a sole and exclusive right in the Van Sweringens to vote the common stock which was subject to the option during the ten year period of the option. Said agreement further provided that the option should be exercisable by the Van Sweringens only after they should have satisfied at least five of the six directors of Midamerica Corporation that they had paid or adjusted any and all claims based upon their then existing commitments or relationships that might then or thereafter become enforceable against them (R. 60-62). It was also agreed, though not specified in said letter agreement, that O. P. and M. J. Van Sweringen should be paid at the rate of $100,000. per year for the services to be rendered by them over the ten year period (R. 257, 279-280).

The organization of Midamerica Corporation was completed in accordance with the agreement of September 21, 1935, with the Van Sweringens and Bradley as three of the six directors, O. P. Van Sweringen as President, M. J.

Van Sweringen and Bradley as Vice Presidents and the remaining offices (other than three directorships) all held by Van Sweringen employees (R. 35-36). Midamerica Corporation then bid for certain Van Sweringen securities at the Morgan auction sale on September 30, 1935 and purchased at that sale, among other things, the Bonds which are the basis of Petitioner's claim. The securities purchased were in two groups and the distribution of the price paid for each group among the different securities which made up the group was not specifically provided for in the bid (R. 37-38). The price so paid was, however, distributed among the different items on the books of Midamerica on the basis of allocating to the securities for which separate bids had been made, the amounts of those separate bids, respectively, and allocating to the securities for which no separate bids had been made, the (relatively nominal) amount of the group bid over the aggregate of separate bids for items included in the group (R. 92-96; Exhibits Y, Z, Z-1 and Z-2, offered at R. 38). The amount, so allocated on the books of Midamerica to the Bonds of the Debtor on which Petitioner's claim is based, was $2.00. The market prices on the date of the sale of the listed securities alone included in the two groups purchased aggregated $5,745,-219.63 (R. 39 and 307). The bid prices totaled $3,121,000 (R. 37-38).

Prior to the Morgan auction sale on September 30, 1935 there had been various discussions between Morgan and the Van Sweringens as to the method of sale and it was not until Morgan had been advised that the Van Sweringens had made arrangements for financing which would make possible a bid by an entity in which the Van Sweringens would be interested, that definite arrangements for a sale were made (R. 177, 203; Exhibit 9, offered at R. 146). Notice of the sale to be held on September 30, 1935 was first given to the general public by publication in various newspapers on September 13, 1935 (R. 52, 59; Exhibit R, offered at R. 25).

No claim is made that the Van Sweringens ever notified the Debtor, or the numerous creditors of the Debtor other than Morgan, of the proposed auction sale, or of the existence or terms of the letter agreement of September 21, 1935, or of the fact that they would be interested on the side of a prospective purchaser at the sale, and so disqualified to represent the interests of the Debtor and its creditors at the sale. Nor did they or Midamerica ever offer the Debtor any opportunity to acquire the bonds which constitute the basis for the claim of Midamerica against the Debtor here involved (R. 40).

The Circuit Court of Appeals found that Midamerica was a combination in corporate form participated in by directors of the Debtor, formed and utilized for the purpose, among other things, of obtaining claims against the Debtor at a sacrifice for the profit of the combination at the expense and to the detriment of the Debtor; that the Debtor was insolvent on the date of the auction sale; that bad faith and breach of fiduciary duty were implicit in the purchases by officers of the company of the corporate securities at the auction sale; and that Midamerica acquired and holds the bonds on which its claim is based as trustee for the Debtor and is entitled to allowance of its claim only in the amount paid for the same, which on the basis of Midamerica's own allocation of the group prices paid at the auction sale must be held to have been $2.00, together with interest thereon (R. 302-303). In so finding the Circuit Court of Appeals adopted the findings of the District Court which had in turn adopted the findings of the Special Master (R. 98, 262, 302-3). The Debtor was insolvent on September 30, 1935, having liabilities far in excess of its assets even if the latter were taken at their book values (R. 85). It had free cash balances then and thereafter which might have been used to acquire its bonds if an opportunity had been given to it to acquire them at bargain prices (R. 41).

## ARGUMENT.

For the purposes of the Petition for a Writ of Certiorari, Petitioner admits that it is in no better position than the Van Sweringens would be if they had personally purchased the claim here involved (Petition, page 3, footnote), and we shall therefore discuss the questions raised on that assumption.

### 1. THE DECISION BELOW IS NOT IN CONFLICT WITH THE DECISION OF THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT IN IN RE NEW YORK RAILWAYS CORPORATION, 82 FED. (2d) 739 (C. C. A. 2, 1936).

As the first of its reasons for granting the writ, Petitioner states that the decision below is in conflict with a decision of the Circuit Court of Appeals for the 2nd Circuit on a matter of importance in the administration of the Bankruptcy Act and refers in that connection to the case of *In re New York Railways Corporation,* 82 Fed. (2d) 739 (C. C. A. 2, 1936), Cert. Den. under the name of *Brukenfeld et al. v. New York Railways Corporation et al.,* 298 U. S. 687 (1936). This case involved the enforceability by the Fifth Avenue Coach Company, for the full amount of principal and interest due thereon, of bonds of its subsidiary, the New York Railways Corporation, then in reorganization under Section 77 B of the Bankruptcy Act, which it had purchased at a discount.

Petitioner attempts to draw a parallel between the facts in the *New York Railways* case and the facts in the case at bar. Petitioner admits that the court in the *New York Railways Corporation* case found that the Board of the Debtor was independent and that there was no ground to infer from its inaction any improper influence by the parent (Petitioner's Brief, p. 14). The court below found the facts in our case to be quite otherwise in respect of this controlling matter. In fact counsel for the Petitioner admits that "the Van Sweringens undoubtedly controlled the

Debtor'' in our case (Petitioner's Brief, p. 14). The court in the *New York Railways* case said at page 741:

> "The Fifth Avenue Coach Company had not so usurped the management of the debtor that the Board of Directors were influenced to inaction and silence on any plan for the debtor itself to buy in its income bonds at a low figure."

Although the court did then say that the failure of the debtor to so act was undoubtedly due to its financial inability rather than to any fiduciary faithlessness, it went on to discuss a theory on which that might not have been so and to indicate that this consideration was not controlling. On page 742, the court said:

> "However, no matter how able the debtor was to buy the income bonds for itself, there is nothing to show, and no ground to infer, that its inaction in this respect was due to the Fifth Avenue Coach Company's control. During this period, its Board had a majority of independent directors free to act without being influenced by any allegiance to the Fifth Avenue Coach Company. The mere fact that the debtor could have made the purchase does not render the stockholders' purchase voidable."

In our case the Van Sweringens not only dominated the Debtor through stock ownership, but they and Bradley, who was also associated with them in the purchasing corporation, constituted three of the five members of the Board of Directors of the Debtor and Bradley was President and M. J. Van Sweringen Vice President of the Debtor at the time the Debtor's bonds were purchased by Midamerica. Our case presents a situation in which there was undoubtedly no independent Board of Directors which could act in the interests of the Debtor. A majority of the Board as well as the chief executive officers of the Debtor had gone over to the side of the purchaser and left the Debtor without representation.

No claim of a conflict on a matter of law of importance in the administration of the Bankruptcy Act can be based upon the fact that the Circuit Court of Appeals for the 2nd Circuit allowed a claim to be proved in full where the purchaser did not dominate the Debtor at the time of the sale and the Circuit Court of Appeals for the 6th Circuit in our case has limited recovery to the amount of the claimant's investment, with interest, where parties associated in interest with the claimant "undoubtedly controlled the Debtor" (Petitioner's Brief, p. 14) at the time the claim against the Debtor was purchased.

It will serve no useful purpose to enter here into a discussion of the evidentiary facts in the *New York Railways Corporation* case, as Petitioner attempts to do in an effort to show that the court in that case was not justified in finding that the Debtor's Board was independent and that the purchaser of the claim against the Debtor did not dominate the management of the Debtor at the time of purchase. That is a question of fact on which there can be no justification for going back of the findings of the court. Petitioner's argument comes down to this, that the Circuit Court of Appeals for the 2nd Circuit found as a fact that there was no domination and control of the Debtor under circumstances which Petitioner feels might have justified a finding that there was such domination and control, although Petitioner does not even claim that the evidence of domination and control was as strong as in our case. Surely, this Court will not grant a petition for a writ of certiorari to remedy such an alleged conflict.

**2. THE DECISION BELOW IS NOT IN CONFLICT WITH THE STATE LAW OF NEW YORK OR OHIO.**

Petitioner's argument that if the conflict with the Circuit Court of Appeals for the 2nd Circuit relates to a question which is controlled by state law, the decision below is probably untenable and is in conflict with the state law is also without foundation, not only because, as shown above,

there is no conflict between the legal doctrines announced by the Circuit Court of Appeals for the 2nd Circuit and the doctrines announced by the Circuit Court of Appeals for the 6th Circuit in our case, but also because there is no conflict between the latter and any applicable state law.

If the question involved is controlled by state law, the applicable law would, as Petitioner says, apparently be either that of New York where the Morgan auction sale was held, or that of Ohio which is the state of the Debtor's incorporation.

Petitioner admits that it has not been able to find any Ohio law which it even claims is in conflict with the decision of the Circuit Court of Appeals in our case. While we have not found in any reported Ohio case a factual situation similar to that in the case at bar, we think the general principles applicable are well stated by the Ohio Supreme Court in the case of *Thomas v. Matthews*, 94 O. S. 32 (1916), where the court says at page 43:

> "It is the settled law of this state that directors must manage the corporate business with a view solely to the common interest, and cannot directly or indirectly derive personal profit or advantage from their position which is not shared by all the stockholders.
>
> The maxim, *uberrima fides*, of the civil law applies without limitation or restriction to their relation to the corporate property and business. They occupy a strictly fiduciary relation to the stockholders and are accountable to them on principles governing that relationship. *Rouse, Trustee, v. Merchants' National Bank*, 46 Ohio St., 493, 502; *Larwill v. Burke et al.*, 66 Ohio St., 683, affirming *Larwill v. Burke et al.*, 19 O. C. C., 449; *Peter v. The Union Mfg. Co. et al.*, 56 Ohio St., 181; *Greenville Gas Co. v. Reis et al.*, 54 Ohio St. 549, 558; *Elliott on Private Corporations* (4 ed.), Sections 502, 503; 8 *Thompson on Corporations* (2 ed.), Sections 1215, 1216; *Warren v. Para Rubber Shoe Co.*, 166 Mass. 97, 104, and 1 *Morawetz on Private Corporations* (2 ed.), Section 517."

Petitioner refers to the case of *Tiffany vs. Smith*, 124 N. Y. Supp. 85 (1910), as the only New York case on the subject. That case, if it be the New York law, is not in conflict with the decision of the Circuit Court of Appeals in our case because there were controlling considerations in that case, not present in our case, which justified the conclusion that the purchaser was not a trustee for the Debtor corporation. The report shows that the case of *Tiffany vs. Smith* was a case for an accounting, brought five and a half years after the sale, that before the purchase was made the company had been dissolved, a receiver had been appointed and the Director's fiduciary duty had therefore been terminated, and that the Director bid in order to compel the banks and other bidders to give a fair price. Moreover, the plaintiff had been guilty of laches as indicated in syllabus 4, which reads in part as follows:

> "4. * * * This transaction (the fiduciary's purchase) having been carried out, defendants invested a large sum in the improvement of the business and property of the corporation without any claim on behalf of plaintiff or the other stockholders to interest therein until five and one-half years thereafter, when on January 24, 1903, plaintiff, a former stockholder, sued to declare a trust of the assets and business of the corporation for the benefit of the old stockholders. *Held*, that the plaintiff's right to relief was barred by laches."

The case therefore cannot be cited as authority for the proposition that a purchase by a director-guarantor would be upheld though he had paid nothing, if he were still at the time of the purchase primarily charged with the duties of a liquidating fiduciary of an insolvent corporation, as were the Van Sweringens, and if the complaint was timely, as here, instead of being barred by laches.

In the case of *Meinhard vs. Salmon*, 249 N. Y., 458 (1928), Judge Cardozo, speaking for the highest court in the State of New York, said at page 464:

> "Many forms of conduct permissible in a workaday world for those acting at arms length are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the 'disintegrating erosion' of particular exception. * * * Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd. It will not consciously be lowered by any judgment of this court."

Discussion of the authorities cited by Petitioner from other jurisdictions than New York and Ohio is reserved for a later portion of this brief.

**3. THE DECISION BELOW IS NOT INCONSISTENT WITH APPLICABLE DECISIONS OF THIS COURT OR OF THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT ON THE QUESTION OF RESPONSIBILITY OF CORPORATE FIDUCIARIES, BUT FOLLOWS THOSE DECISIONS.**

The Petitioner discusses at some length the cases of *Twin-Lick Oil Co. vs. Marbury,* 91 U. S. 587 (1875) and *Arn v. Bradshaw Oil & Gas Co.,* 108 Fed. (2d) 125 (C. C. A. 5, 1940) and argues that the decision below fails to follow the principles laid down in those cases. In our view the decision below not only is not inconsistent with those cases but correctly applies the principles laid down in them.

In *Twin-Lick Oil Co. vs. Marbury, supra,* a director had in good faith loaned money to his corporation and taken a mortgage on certain of its property to secure the loan. On default, he foreclosed the mortgage and bought in the property. The court held that he was not accountable for profits later derived from the property so purchased. This conclusion was reached because of the ex-

istence of circumstances which were not present in our case, including the facts that the purchase was made at a fair price after adequate notice to the other parties to whom the director had a fiduciary relationship and after those other parties had refused to join the director in the purchase. It further appeared that, as stated in the third paragraph of the syllabus,

> "it was nearly four years thereafter, when the hazard was over, and his skill, energy and money had made his investment profitable, that any claim to, or assertion of right in, the property was made by the corporation or the stockholders."

In discussing the general principles applicable to a director's right to acquire and enforce claims against his corporation, the court said at page 590:

> "So, when the lender is a director, charged, with others, with the control and management of the affairs of the corporation, representing in this regard the aggregated interest of all the stockholders, his obligation, if he becomes a party to a contract with the company, to candor and fair dealing, is increased in the precise degree that his representative character has given him *power and control* derived from the confidence reposed in him by the stockholders who appointed him their agent. If he should be a sole director, or one of a smaller number vested with certain powers, *this obligation would be still stronger,* and his acts subject to more severe scrutiny, and their validity determined by more rigid principles of morality, and freedom from motives of selfishness." (Emphasis ours.)

In our case there is no doubt that the Van Sweringens and Bradley, who participated in the formation of the purchaser corporation, dominated the Debtor, constituting a majority of its Board and its chief executive officers, and that they took no means whatsoever to insure independent representation of the interests of the Debtor and its credi-

tors, but abandoned the Debtor without notice when they went over to the adverse position of purchasers.

In the case of *Arn v. Bradshaw Oil & Gas Co., supra,* a bank, holding a first mortgage given by an Oil Company, had foreclosed the mortgage and bid in the property at a judicial sale. A few days later, by a separate and independent transaction, it resold the property to the Bradshaw Company, which had been formed for the purpose of purchasing it by a group of second lien creditors of the Oil Company. Bradshaw, who was President of the new company, and Boyd, who owned a stock interest in the new company, had been directors of the Oil Company. The stockholders of the Oil Company attempted to have the sale set aside, or, alternatively, to declare the title held in trust for them. Their complaint was denied. The reason for the decision is set forth on page 127 as follows:

> "We shall not review the evidence. It clearly supports the conclusion that all the directors did their best by the Operators Company prior to the sale. Counsel for appellant mainly argues that the respondents Bradshaw and Boyd, being still directors at and after the sale, were bound formally to notify the stockholders that the property had been sacrificed by the sale but could be redeemed from the Bank at a low figure; and that the redemption which was in fact accomplished by these directors inures in equity to the benefit of the Operators Company. We recognize that directors are as respects their corporation and its stockholders quasi trustees, and that they are not allowed to obtain or retain any personal advantage due to a misuse of their position. The application of the principle here fails, because the directors did not misuse their position to obtain the challenged result, and because they have not personally obtained the property of their company.
>
> Kendall, who represented the Bank on the executive committee of Operators Company, resigned when the mortgage was foreclosed and long before the sale. Bradshaw, who was made director and put on

the committee as representing International Supply Company, which had the largest second lien of $160,000., resigned his connection with International and surrendered his stock in that company long before the sale. He testifies he resigned also as director in Operators Company and ceased to act as such as early as July, 1933, when the bankruptcy receiver took charge of the Company's offices and books; but there is some evidence to the contrary. Boyd, who actually superintended the wells, testifies he ceased to act as director, as did all the others, when the receiver appeared, though the receiver did not take over the wells, because the State court had them under foreclosure, and that, after July, 1933, he was paid a salary by the Bank for his services in superintending them. The corporation, before and after the sale, was actively represented by its receiver, and additionally in its own name by its counsel employed presumably by the President Dunnett, and these stockholders had their present counsel on the ground and appearing for the receiver. These all applied to the State court for further delay of the sale, which was denied. They opposed confirmation of it both on the ground that the property had sold too cheap and that the collusion above referred to existed. Confirmation was ordered. The Court of Civil Appeals refused to interfere. It is very plain that the sale was not the sale of the directors or any of them but was the sale of the court. No director had brought it about or contributed to it. The stockholders knew all about it through their counsel, just as the corporation knew about it through its counsel, its receiver and its President who was present at the sale. All parties had the same opportunity to purchase the property from the Bank, the successful bidder, and all no doubt knew that the Bank would ask only its money and expenses."

The distinctions between that case and the case at bar are so apparent as to require no discussion. The court arrived at its decision in view of its findings with reference to the controlling facts above set forth, while affirming (at page 128) its adherence to "the principle that fiduciaries

will not be permitted to profit personally by selling or buying the property committed to their care irrespective of actual fraud."

**4. THE DECISION BELOW PROPERLY APPLIES TO PRINCIPLES LAID DOWN IN PEPPER vs. LITTON, 308 U. S., 295, AND THE WELL SETTLED PRINCIPLES OF EQUITY AS DECLARED BY THIS COURT WITH REFERENCE TO A DIRECTOR'S DUTY OF LOYALTY.**

Petitioner cites the case of *Sanford Fork & Tool Co. vs. Howe, Brown & Co.*, 157 U. S., 312 (1894), in which case this Court had under consideration the validity of a mortgage given by a corporation at a time when its assets may not have been equal at cash prices to its indebtedness, although it was still a going concern, to protect its directors against loss on account of the continuance and renewal of their personal guaranties of the corporation's notes. It was held that the mortgage was valid and enforceable by the directors to protect them from loss on notes which they had endorsed and had taken up for the protection of their corporation's business. There was no question of directors enforcing the mortgage against their corporation for more than they had paid, or making a profit on their corporation's property.

In our case the Circuit Court of Appeals did not deny the Petitioner reimbursement for the amount actually paid, with interest. It merely denied Petitioner a right to make a *profit over and above its investment and interest thereon* on a claim which had been purchased at a sale at which a majority of the Board of Directors of the Debtor were interested in the purchaser and at which the Debtor had no representation. The decision of the court below, far from undermining a director's duty of loyalty as asserted by Petitioner, merely applies the principle that before a director is in a position to act independently for himself in a manner adverse to his corporation, he must make sure

that his corporation has adequate independent representation, full notice of the sale and of all facts with reference to the director's connection with the purchaser or otherwise which might influence the corporation or its stockholders or creditors to action or inaction in connection with the sale, and must further pay a fair price for the claims or assets purchased.

For the purpose of this petition, Petitioner admits that it stands in the shoes of the Van Sweringens and is in no better position to enforce its claim for an amount larger than its investment and interest than the Van Sweringens would be if they had personally purchased the bonds at the Morgan sale. (Petition, page 3, footnote.) Petitioner further admits that the Van Sweringens undoubtedly controlled the Debtor. (Petitioner's Brief, page 14.) No claim has been made that the Van Sweringens made any effort to provide the Debtor with independent representation for the purposes of the sale or that they brought to the attention of the Debtor or its creditors the fact that they were associating themselves with a prospective purchaser and were therefore financially interested in having the sale price be as low as possible, instead of as high as possible as required by the interests of the Debtor and its creditors. Furthermore, it is admitted that the value on the basis of market quotations of the listed securities purchased by Midamerica at the Morgan sale was $5,745,219.63 (R. 39, 307) in comparison with the sale price of $3,121,000. (R. 37-38) and that there were numerous securities included in the sale which had no market value, among which were the bonds on which Petitioner bases its claim which is here in issue. No effort whatsoever was made to support the reasonableness of the price paid for the securities purchased at the sale, or to overcome the inference of unfairness arising from the fact that the market price of the listed securities included therein exceeded the sale price by more than $2,600,000., otherwise than by showing that the sale

was made at public auction of which the usual formal notice had been given.

The mere fact that a director's purchase was made at a public sale does not sustain the burden which rests upon him of showing that he paid a fair price for property of the corporation with reference to which he owes a fiduciary duty to see that the corporation receives an adequate consideration.

*Geddes v. Anaconda Mining Co.*, 254 U. S., 590 (1920). In that case this Court said at page 601:

> "As an original proposition, we cannot think that the amount offered for property at a public sale for cash, is such a measure of its value that the failure to obtain a bid at such sale for more should be accepted by courts as a sufficient reason for affirming a sale for a price which they found, on other evidence, to be inadequate. In business life forced sales for cash are such a last resort for obtaining money that a sale 'under the hammer' is synonymous with a sale at a sacrifice and prices obtained at such sales have usually been rejected by courts when tendered as evidence of value."

The decision below merely applies the well settled principles of equity declared by this Court in *Pepper vs. Litton*, 308 U. S. 295 (1939) and other decisions, to the facts of this case as found by the Special Master, the District Court and the Circuit Court of Appeals. No other decision could be rendered on the facts as found without undermining the directors' duty of loyalty.

**5. PETITIONER CONFUSES THE RIGHT OF A DIRECTOR TO PROTECT HIMSELF AGAINST LOSS IN A TRANSACTION ENTERED INTO FOR THE BENEFIT OF HIS CORPORATION WITH A SUPPOSED RIGHT TO MAKE A PROFIT AT THE EXPENSE OF HIS CORPORATION AND ITS CREDITORS WHICH WILL COMPENSATE HIM FOR LOSSES OTHERWISE SUFFERED.**

Petitioner attempts to arouse sympathy with the plight of the Van Sweringens and to justify their making a profit on claims and securities purchased at the Morgan sale by referring to the large losses with which they appeared to be threatened by reason of their investment in the stock of Vaness and their guaranty of the loan of the Debtor and Vaness. Petitioner insists that on account of these prospective losses the Van Sweringens were entitled to protect their own interests by acquiring the securities to be sold at the Morgan sale at the lowest possible price. In developing this phase of its argument Petitioner fails to distinguish between the right of a director to protect himself against loss on a transaction entered into for the benefit of his corporation and a supposed right to make a profit at the expense of his corporation and its creditors which will compensate him for a loss otherwise suffered in transactions entered into with reference to the corporation's affairs. This distinction is important.

Authorities cited by Petitioner lay down the principle that where a director has loaned money to his corporation, for instance, and taken a mortgage on the corporation's property to secure that loan, he is entitled to enforce the mortgage and buy in the property at a foreclosure sale, *provided full notice is given to other interested parties so that they may protect their positions, knowing that the director is acting independently in his own interest and can not be relied upon to protect theirs, and provided further that the director pays a fair price for the property at the sale.* This is a very different proposition, however, from saying that if a director is threatened with the loss of

money arising out of his investment in the stock of an insolvent corporation, or out of a guaranty of the corporation's obligations to some creditor, he may, for that reason, buy property of the corporation or a claim against the corporation for an inadequate consideration and without adequate independent representation of the interests of the corporation and its other creditors, and thereby make a profit at the expense of the corporation and its creditors which he can set off against the loss he has suffered, or expects to suffer, on his stock investment or his guaranty.

It is evident that the interest of the Van Sweringens as guarantors of the Debtor's obligation was to have the pledged securities sold for as large a price as possible so as to reduce the deficiency and their consequent liability on their guaranty. But as soon as they appeared in the role of purchasers, their interest was to have the pledged securities sold for as small a price as possible so as to increase the profit they could subsequently make on a resale or continued holding. The two roles are inconsistent and should never be confused.

When the question before us is whether the director acquired property of his corporation or a claim against his corporation charged with a trust to account to the corporation or its creditors for any profit which he may make upon the same, the result is not affected by preceding transactions in which the director may have been involved which may have caused him to lose money or to face the probability of later losing money, any more than it would be affected by preceding transactions in which the director was involved which resulted in a profit to him in connection with the corporation's affairs.

The very reason for the rule establishing a fiduciary duty in the director's dealings with the properties and rights of his corporation, especially when the corporation has become insolvent and the rights of creditors as well as the rights of stockholders are involved, is the natural

conflict of interest between the director as a creditor or purchaser of property of the corporation, and the other stockholders and creditors of the corporation, and the fact that he is in a position to profit at the expense of other stockholders and creditors if he is permitted to "protect his own interests" without regard to the interests of other stockholders and creditors. The director has no more right to protect his own interests where his previous connection with the corporation has turned out badly for his own financial interests, than where that connection has turned out well. In fact his fiduciary obligations are enlarged when the corporation has become insolvent while he is a director, and he is then held to the utmost good faith in protecting the interests of creditors as well as stockholders, and should not be allowed to make any profit out of the situation which will tend to reimburse him for a part of the losses he may have suffered otherwise, while leaving other creditors to bear their losses in full, enlarged by his failure in his fiduciary capacity to realize as much as possible on the corporation's assets, or to reduce as far as possible its obligations, for the benefit of all creditors.

Recognition of the distinction between protecting a director against loss on the particular transaction into which he has entered for the benefit of his corporation, and permitting him to make an otherwise unjustifiable profit which he may set off against losses from other transactions, will go far to reconcile what might otherwise seem like conflicting decisions.

## CONCLUSION.

It is respectfully submitted that this Court should deny Midamerica's petition for a writ of certiorari because (a) there is no conflict between the decision below and other decisions of this Court or any other Circuit Court of Appeals or any State Court whose decisions could be considered applicable to the present controversy and

(b) because the decision below correctly applies the principles of law with reference to the fiduciary obligations of directors to the facts as found by the Circuit Court of Appeals, the District Court and the Special Master.

Respectfully submitted,

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1941.

No. 614

IN THE MATTER OF
THE VAN SWERINGEN CORPORATION,
Debtor,

and

THE CLEVELAND TERMINALS BUILDING COMPANY,
Subsidiary Debtor.

THE TERMINAL AND SHAKER HEIGHTS REALTY COMPANY (FORMERLY MIDAMERICA CORPORATION),
*Petitioner,*

*vs.*

THE CLEVELAND TERMINALS BUILDING COMPANY,
*Respondent.*

( A. B. GOCHENOUR, ET AL., *Intervenors.*)

## BRIEF OF INTERVENORS, A. B. GOCHENOUR, ET AL., IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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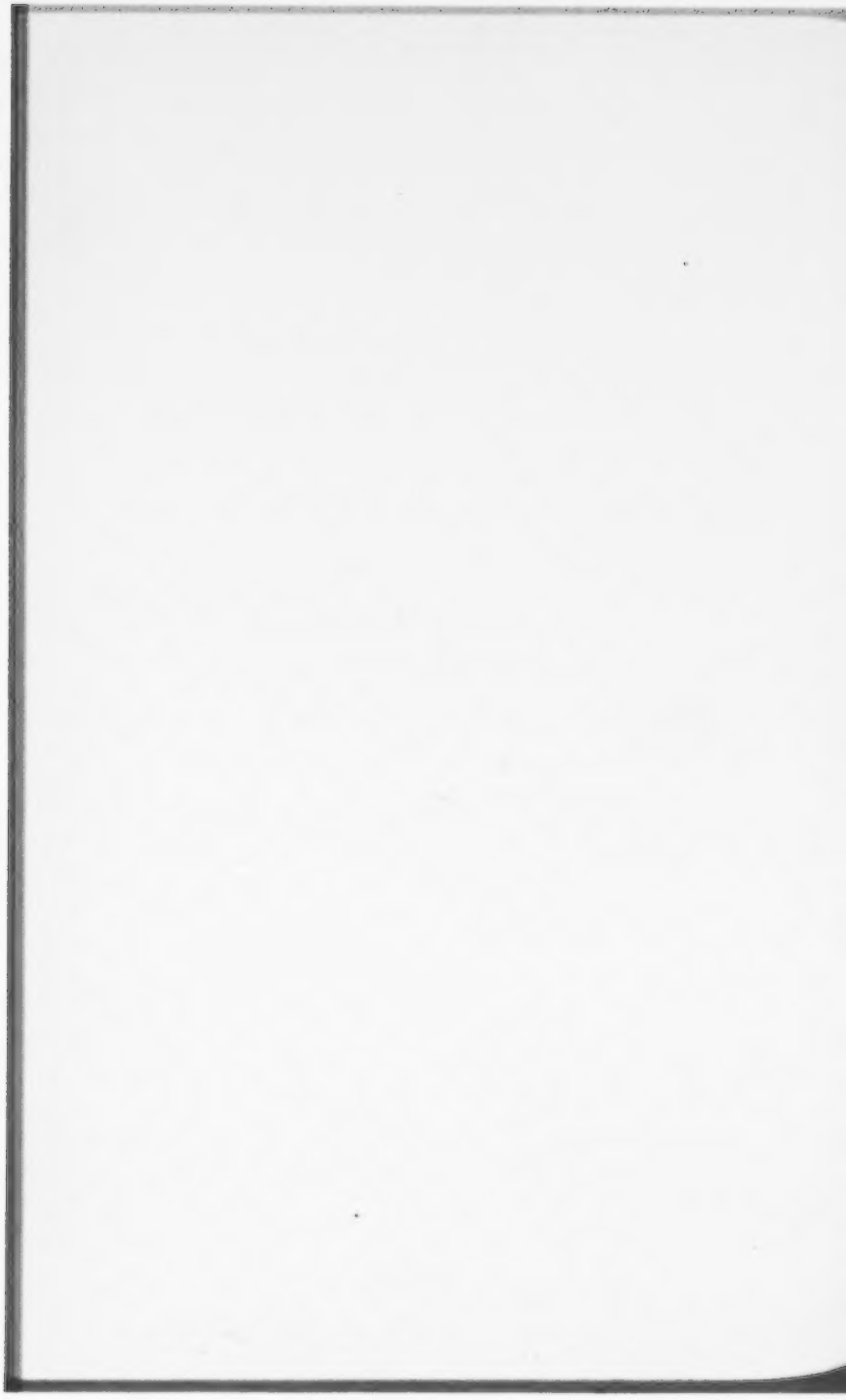

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*vs.*

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*Respondent.*
(A. B. GOCHENOUR, *et al.*, Intervenors.)

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## BRIEF OF INTERVENORS, A. B. GOCHENOUR, ET AL., IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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### STATEMENT.

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Petitioner, Midamerica, filed a claim for $1,348,614.99 in 77B proceedings of Van Sweringen Corporation, debtor, and The Cleveland Terminals Building Company, subsid-

iary debtor, on account of bonds of the subsidiary debtor, which bonds were acquired by petitioner on September 30, 1935, for an investment of $2.00. Intervenors, as creditors, filed objections to the claim on August 27, 1937. (R. 292) Thereafter on May 9, 1938, objections to the claim were also filed by counsel for the subsidiary debtor. (R. 26)

The Circuit Court of Appeals affirmed the judgment of the District Court which adopted the recommendation of the Special Master and allowed the claim in the sum of $2.00 with interest at 6% per annum from October 1, 1935, on the ground that Midamerica was a combination in corporate form, participated in by directors of the respective debtor corporations, formed and utilized for the purpose, among other things, of divesting the debtor corporations of their properties or of obtaining claims against them at a sacrifice for the profit of the combination at the expense and to the detriment of the insolvent debtor corporations; that there was bad faith and breach of fiduciary duty; that Midamerica acquired and holds said bonds so purchased by it as trustee for the subsidiary debtor and therefore is not entitled to more than $2.00, the amount paid, together with interest thereon.

## The Formation of Midamerica and the Purchase at the Morgan Auction.

The Van Sweringen brothers, O. P. and M. J. Van Sweringen, were officers and directors of the debtor, the subsidiary debtor and all of the interlocking corporations affiliated with them. C. L. Bradley was president of the subsidiary debtor. M. J. Van Sweringen was its Vice President. C. L. Bradley was also vice president of the debtor corporation, Van Sweringen Corporation, and treasurer of The Vaness Company, the top holding company. M. J. Van Sweringen was also vice president of The Vaness Company and of Van Sweringen Corporation. O. P. Van Sweringen was president of The Vaness Company and

of Van Sweringen Corporation. A complete list of the directors and officers of The Vaness Company, Van Sweringen Corporation and The Cleveland Terminals Building Company is attached to the stipulations as Exhibit K. (R. 42 to 47)

Early in August, 1935, O. P. Van Sweringen requested financial assistance from G. A. Tomlinson, who introduced O. P. and M. J. Van Sweringen to George Ball of Muncie, Indiana. The Van Sweringens informed Ball of the proposed auction of the securities pledged with J. P. Morgan & Co. as collateral for the loans of their company and appealed to Ball for financial assistance. As a result of the conferences and negotiations which followed, Midamerica Corporation was organized by the Van Sweringens and their attorneys for the very purpose of acquiring the securities to be sold at the auction sale on September 30, 1935. (R. 34 and 35; stip. 26, 27, 28, 29, 30; and Ex. S, R. 60)

Petitioner now attempts to show that the Van Sweringens did not control Midamerica and, at page 7 of their petition, they state:

> "Thus although the Van Sweringens were the chief officers" (of Midamerica) "they did not—and could not—control the board."

It appears too obvious that the contrary is true, as found by the courts below. The Van Sweringens, without investing one cent, acquired voting control of Midamerica for a period of ten years; procured an option to buy 55% of its stock for $8250 plus 5% interest; and assured themselves of a salary of $100,000 per year for the ten year option period. (R. 61, Par. 3) Fifty percent of the personnel of the board was named and controlled by the Van Sweringens. The Van Sweringens were elected as corporate officers of Midamerica. No change could be made without a consent of five out of six members of the board. Thus a permanent control was vested in the Van Sweringens over the affairs of Midamerica. Furthermore, it

required a vote of five of the six directors to make changes referred to at page 7 of the petition. Since the Van Sweringens always controlled three of the directors that was tantamount to control.

**Cost to Midamerica.**

The bonds which are the subject of petitioner's claim in this proceeding were entered by Midamerica on its journal as having been purchased at the auction sale for $2.00. (R. 94, 95, 96, and Ex. Z1 and Z2)

Now petitioner contends that these entries were arbitrarily assigned for purposes of accounting, although no effort was made by petitioner-claimant to disclose any other figure as being the true price paid or allocated therefor.

The record will not lend itself to any theory contrary to the facts stipulated as to the allocated cost of the securities in question.

As shown by the record and as appears from Appendix A, pages 30 and 31 of petitioner's brief, among the securities in Group 1 and Group 3 purchased by Midamerica at said auction sale were securities which, on that date, had listed market prices totaling $5,745,219.63. (R. 152)

20,000 shares of Cleveland Railway stock, acquired in Group 1, were later sold at $60.00 per share, and 20,383 shares were sold at $65.00 per share. (R. 40, Stip. 47) Part of the assets purchased in Group 1 and Group 3 were sold by Midamerica at the price of $6,375,000. (R. 180) Thus Midamerica received a total of $8,899,895, which, after deducting a total investment of $3,121,000, left a profit of $5,778,895.

## ARGUMENT.

Petitioner contends that the decision below is in conflict with decisions of the Circuit Courts of Appeals in the Second and Fifth Circuits and that the decision conflicts with applicable decisions of this court.

Petitioner also asserts that if the conflict with Circuit Court of Appeals for the Second Circuit relates to a question which is controlled by state law, the decision below is probably untenable and is in conflict with the state law.

### 1. There Is No Conflict in the Decision Below With the Applicable Decisions of This Court or With the Decisions of Other Circuit Courts of Appeals.

The cases relied on by petitioner do not hold contrary to the principles asserted by the court below. The law as applied to the facts in the case at bar is in conformity with well settled legal principles uniformly adopted by both state and federal courts.

In *In re New York Railways Corporation*, 82 F. (2d) 739 (C. C. A. 2, 1936), (cited in petitioner's brief as the Second Circuit case with which the present decision conflicts), the facts found with reference to bad faith and fiduciary duty were exactly contrary to the facts found in the case at bar. At page 14 of petitioner's brief opposing counsel recognize one important distinction between the facts in the New York Railways case and those in the case at bar to be that the board of directors of the subsidiary company in the *New York Railways* case "was independent and that there was no ground to infer from its action any improper influence by the parent."

That the *New York Railways* case was carefully considered and distinguished in several respects is clear from what the District Court stated in its opinion in the case

at bar (R. 257), and as there stated "no parallel or analogy is found as between New York Railway Corporation and the Fifth Avenue Coach Company and these debtors and the Van Sweringens." The following points of distinction were thereupon indicated:

1. The Fifth Avenue Coach Company had no fiduciary relationship to the New York Railways Corporation, debtor.

2. It did not have the management of the debtor.

3. It had a majority of independent directors.

4. The Van Sweringens dominated and controlled the debtors.

5. The Van Sweringens were the chief officers, directors and stockholders.

6. Van Sweringen Corporation and The Cleveland Terminals Building Company were an integral part of the Van Sweringen interlocking enterprises.

7. The Van Sweringens were the principal officers of Midamerica, the purchaser and claimant.

From the record in the case at bar a distinction is just as real as it is apparent.

In *Arn* v. *Bradshaw Oil & Gas Co.*, 108 Fed. (2d) 125 (C. C. A. 5, 1940), (cited at page 24 of petitioner's brief as the Fifth Circuit case relied upon as being in conflict with the decision in the instant case), the facts likewise were different from those in the case at bar. There the directors did not misuse their position to obtain the challenged result; no director brought about the sale or contributed to it. All of the directors did their best on behalf of their corporation prior to the sale; all parties had the same opportunity to purchase the property. For these and other reasons disclosed by the opinion in the *Arn* case, as differing from the facts in the case at bar, there was no violation of the well established principle involving an inhibited area of bargaining and breach of fiduciary relationship as the facts in the case at bar present.

The opinions in the cases decided by the Second and Fifth Circuits indicate complete accord with the decision in the case at bar, and not a conflict as is claimed by petitioner.

In *Twin-Lick Oil Co.* v. *Marbury,* 91 U. S. 587, cited by petitioners, although the facts were entirely different from those in the case at bar the court said, at page 590:

> "So, when the lender is a director, charged, with others, with the control and management of the affairs of the corporation, representing in this regard the aggregated interest of all the stockholders, his obligation, if he becomes a party to a contract with the company, to candor and fair dealing, is increased in the precise degree that his representative character has given him *power and control* derived from the confidence reposed in him by the stockholders who appointed him their agent. If he should be a sole director, or one of a smaller number vested with certain powers, *this obligation would be still stronger,* and his acts subject to more severe scrutiny, and their validity determined by more rigid principles of morality, and freedom from motives of selfishness." (Italics ours.)

In the instant case the Board of Directors were more than "influenced to inaction and silence." A majority of them actually participated in the formation of Midamerica Corporation!

The rule announced by this court in *Pepper* v. *Litton,* 308 U. S. 295, was properly followed by the court below notwithstanding the unmerited criticism by petitioner that there was an over-zealous application of the principles there enunciated by this court, even to the extent that the result may lead to undermining a director's duty of loyalty—a virtue which was wholly disregarded by the Van Sweringens and their associates. The rule announced in *Pepper* v. *Litton* was reiterated by this court in *Sampsell* v. *Imperial Paper & Color Corporation,* 313 U. S. 215, 61 S. Ct. 904, 85 L. Ed. 797. Mr. Justice Douglas, speaking on behalf of the court, stated (page 218):

> "Mere legal paraphernalia will not suffice to trans-

> form into a substantial adverse claimant a corporation whose affairs are so closely assimilated to the affairs of the dominant stockholder that in substance it is little more than his corporate pocket. Whatever the full reach of that rule may be, **it is clear that a family corporation's adverse claim is merely colorable where, as in this case, the corporation is formed in order to continue the bankrupt's business, where the bankrupt remains in control, and where the effect of the transfer is to hinder, delay or defraud his creditors.** *In re Schoenberg*, 2 Cir., 70 F. 2d 321; *In re Berkowitz*, D. C., 173 F. 1013. And see Glenn, Liquidation, §§ 30-32. Cf. *Shapiro* v. *Wilgus*, 287 U. S. 348, 53 S. Ct. 142, 77 L. Ed. 355, 85 A. L. R. 128." (Bold type supplied.)

Compare this with the opinion of the trial court in the instant case (R. 258):

> "Under the option and purchase arrangement, if the Van Sweringens died or failed to satisfy their creditors within ten years, Ball and Tomlinson took all. **It was a mutually satisfactory arrangement for their common protection against those who might try to pursue the Van Sweringen fortunes through the intricate maze of corporate entities.** Thus, it assured control to the Van Sweringens without creditor interference and gave to Ball and Tomlinson, their associates, freedom from the threat of stranger majority in control of the voting stock. **The option was just what it was intended to be, a device for placing the Van Sweringens' interests in the purchased securities and obligations beyond the reach of their and these debtors' creditors.**" (Bold type supplied.)

The decision of the Sixth Circuit which affirmed this decision is therefore in accord with the views of this court.

### 2. The Decision in This Case Is Not Untenable or in Conflict With State Laws.

Petitioner's contention on this point is very weak. The New York law on which petitioner relies for probable conflict is the rule announced in *Tiffany* v. *Smith*, 124 N. Y.

Supp. 85, which petitioner says (p. 20) is "the only New York case on the subject." That case involved a sale by a *receiver* and there was no question about failure to give notice to creditors, and the directors did not stand in a fiduciary position to creditors. The *Tiffany* case is cited in *Herring* v. *Curtiss,* 200 N. Y. Supp. 7, 48 on the point that the directors were absolved from a breach of the trust but that decision was *reversed* on appeal in 233 Appellate Division, page 101. The *Tiffany* case relied on cited the decision in *Marr* v. *Marr,* 72 N. J. Equity 797, but it overlooked that the New Jersey Court of Errors *reversed* the decision in 70 Atlantic 375. There it said (page 378):

> "But we deem it clear that the director, who is also creditor, must, on taking legal proceedings for collection of his debt, relinquish his trust *pro hac vice,* not covertly, but openly, and with fair notice to his company. Whether such notice should be given to the stockholders or to the directors may depend upon circumstances. If the company is equipped with other officers and directors who are actively representing the interest of the stockholders, it may well be that notice to such officers or directors would be deemed sufficient. But it is, as we think, inconsistent with the duty of a director (at least under circumstances such as are here presented) that he should assume an attitude antagonistic to his company, unless he sees to it that the interests of the stockholders, which he, by reason of his personal interest, is for the time disqualified from protecting, are in the charge of other officers and directors able and willing to protect them, and to whom his notice may be given, or else sees to it that fair notice of his contemplated action be given to the stockholders, so that they may take measures to protect themselves."

The rule was followed in *Endicott* v. *Marvel,* 87 Atl. 230 and in *Union Ice Co.* v. *Hulton,* 291 Pa. 416, where the director purchased at a "public sale". In the latter case the court cited the *Marr* case, *supra.*

Notwithstanding the statement that the *Tiffany* case is the "only" New York case on the right of a director-credi-

tor to purchase the property of his corporation to protect his creditor's position without notice to the corporation or to its creditors in the event of insolvency, *the contrary appears* in *Claude Neon Lights* v. *Fed. Electric Co.*, 295 N. Y. S. 1-6, 250 App. Div. 510 (1937). See also *Lonsdale* v. *Speyer*, 291 N. Y. S. 495, 249 App. Div. 133 cited in the opinion. (R. 307.)

Even in cases where the director-creditor may become a purchaser in order to protect his creditor's position, he must "warn the corporation" that he would "bid" and afford it the opportunity to protect its rights (*Wilson* v. *Thelan*, 100 P. (2) 923 (Mont. 1940). There it was said (page 927):

> "Where there is a forced sale of corporate property *a director who is also a creditor who warns the corporation that he is about to do so, may bid* upon the property without being charged improperly taking an interest adverse to the corporation." (Italics ours)

No such "warning" was given in the instant case. The authorities on this point are collected in 76 A. L. R. pp. 454-455.

No Ohio case is cited as being in conflict with the decision of the Circuit Court of Appeals in the instant case, and none can be cited because the Ohio courts enforce the rule against dishonest or double dealing and do not sanction the fraudulent purchase of corporate property by directors of corporations. The Ohio courts always subject such purchases to the closest scrutiny and adhere to the principles discussed in 13 American Jurisprudence, page 960, § 1009, under title "Corporations," from which the following is quoted:

> "In order, however, that a director purchasing his company's property at a judicial or other public sale may acquire a valid title, it is necessary that parties interested or affected thereby shall have a sufficient notice of the sale in order that they may have an oppor-

tunity to bid, if they desire. Furthermore, in those jurisdictions where the purchase of corporate property at a judicial or other public sale by an officer or director of the corporation is upheld, *provided the transaction is accomplished with good faith* and full disclosure of the facts, the burden of establishing the bona fides of the transaction is upon the purchaser. The validity of the sale is affected by the adequacy or inadequacy of consideration, and *a purchase at a grossly inadequate price is very strong, if not almost conclusive, evidence of fraud or bad faith.*" (Italics ours)

If the New York law be applicable here as contended by petitioner, then, *the rule announced in the McCrory case* (12 F. S. p. 267) *was adopted in New York* (*Claude Neon Lights* v. *Federal Electric Co.*, 295 N. Y. S. 1, 250 App. Div. 510). There, the court said (page 517):

"In Fletcher's Cyclopedia of Corporations (Permanent ed. § 869) it is stated that the general rule is that directors or other officers may purchase, and enforce, claims against their corporations, at their face value, notwithstanding they were bought at a discount, provided, however, that (1) if such officer owed the duty to his company to purchase the claim for the company instead of for himself he cannot enforce his claim in excess of what he paid for it, and, according to what is apparently held in a few decisions, that (2) if a corporation is insolvent at the time of the purchase the officer cannot enforce his claim for more than he paid for it. The rule is reiterated in *Matter of McCrory Stores Corporation* (12 F. Supp. 267), where it is said: 'Under ordinary conditions a director may purchase claims against his corporation at a discount and enforce them for their full amount. (*Seymour* v. *Spring Forest Cemetery Association*, 144 N. Y. 333; 39 N. E. 365; 26 L. R. A. 859; *Glenwood Mfg. Co.* v. *Syme*, 109 Wis. 355; 85 N. W. 432; Fletcher on Corporations, § 2289.) *But the case is different where the corporation is insolvent and is itself in the field to settle the claims. A director who acquires claims under such circumstances may enforce them for no more than the cost of acquisition.*' "

See also *Billings* v. *Shaw*, 209 N. Y. 265 and *Jno. Dunlop's*

*Sons* v. *Dunlop*, 14 N. Y. S. (2) 452 (1940). There the court said (page 453):

> "Directors may not act in a dual capacity to their individual advantage. Silence when speech is imperative, concealment when disclosure is necessary, disloyalty when faithfulness is indicated, constitute breaches of fiduciary relationship for which relief in equity may be had."

Such relief was given under the rule that a court of Bankruptcy is essentially a court of equity (*Pepper* v. *Litton*, 308 U. S. 295).

Notwithstanding the bold effort of petitioner to secure the aid, approval and blessing of a federal court of equity of such unjust enrichment, the facts disclosed by the record in the case at bar are too conscience shocking for any court to be lured into such approval or deviation from established standards of morality.

**Conclusion.**

It is clear that the decision of the United States Circuit Court of Appeals for the Sixth Circuit, in the instant case, followed the well settled applicable legal principles, universally accepted, in affirming the judgment of the District Court and the findings of the Special Master. Justice has been done in accordance with equity and good conscience.

The petition for writ of certiorari should, therefore, be denied.

Respectfully submitted,

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